



10-1975

Federal Power Commisison v. Moss

Lewis F. Powell Jr.

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Ron - may see list of perfect ^{to keep case} ~~imp.~~ & CADX ~~decision~~ ^{plausibly} ~~wrong~~
FPC, as a measure of stimulating

DISCUSS new natural gas production, adopted Order 455. This provides for an optional ~~part~~ procedure for approval of rates. The prevailing procedure is "area pricing" - setting a price ceiling and allowing retroactive adjustment. Under Order 455 specific contracts may be approved at rates found reasonable without retroactive adjustment.

Consider granting -
As indicated in the memo, I don't think summary reversal is in order,

all aspects of 455 were upheld by CADX except the right of FPC, ~~as part of~~ the contract approval, to authorize abandonment of service of and of etc. CADX ~~held this~~ violated 7(b)(5) (Sept 7)

PRELIMINARY MEMORANDUM

but the decision below is questionable, particularly in the context of review of an agency rule, and the issue is of great importance, as

March 14, 1975 Conference
List 1, Sheet 3
No. 74-883
FEDERAL POWER COMMISSION
v.
MOSS, et al.

Cert to CADX (Tamm, MacKinnon, Robb)
Federal/Civil
Timely

1. Summary: This case concerns the new FPC rule establishing an optional "contract method" for certifying producers' sales of "new" natural gas to customers in interstate markets. Under this optional procedure, the Commission will be able to certificate specific contract sales of natural gas. The ~~rates~~ ^{rates} at which the gas is sold will be governed

I understand, both to the FPC and to the industry. RC

by the terms of the contract between the producer and customer, if found by the Commission to be just and reasonable, rather than by the fluctuating area rates for new gas now or hereafter established by the Commission. In addition, in certifying the contract sale, the Commission will simultaneously authorize the producer to abandon the interstate service at the conclusion of the contract term. CADC (Robb) generally upheld this optional procedure, finding it consistent with the requirements of the Natural Gas Act. It held, however, that the provision allowing the Commission to approve abandonment at the end of the contract term is inconsistent with Section 7(b) of the Act, 15 U.S.C. § 717f(b). The FPC seeks certiorari, asking the Court to reverse this aspect of CADC's decision.*

2. Facts and Decision Below: Producers of natural gas are required, under § 7(c) of the Natural Gas Act, to obtain from the FPC certificates of public convenience and necessity for sales of natural gas to pipelines or other customers in interstate markets. Once having obtained such

* Respondents urge that the abandonment aspect of CADC's decision cannot be considered in isolation from that Court's rulings on other aspects of the optional procedure. They have, therefore, filed a petition, No. 74-1045, challenging those parts of CADC's decision upholding the optional procedure. That petition, however, is made contingent on the Court's granting the FPC's petition.

certificates, the prices at which the producers may sell their gas are governed by area rates (i.e., those applicable to all producers in a defined production area) established by the Commission as "just and reasonable" under § 4 of the Natural Gas Act. The area rates are, in effect, price ceilings: the producer may not charge more than the area rate, although he may contract with specific customers to sell for less. Moreover, if the Commission retroactively adjusts the area rate applicable to specific sales downward, the producer may be required to refund the difference to his customers. Finally, once the producer is certificated to sell interstate, he may not abandon such service unless the Commission finds, under § 7(b) of the Act, that abandonment is consistent with the public convenience and necessity.

On August 3, 1972, the Commission, after following the requisite procedure for rulemaking, issued Order No. 455, amending its rules to establish an "optional procedure for certificating new producer sales of natural gas" in interstate markets. The Commission found that because of lengthy appellate review and the possibility of refund obligations producers were reluctant to ^{rely} ~~rely~~ on area rates established by the Commission. Hence producers were reluctant to dedicate newly discovered gas reserves to the interstate market, rather than the unregulated intrastate market, or to incur the heavy

*Amended
Rules to
establish
optional
procedure*

investment necessary to the discovery and development of new gas supplies. The optional procedure is, according to the Commission, designed to alleviate the uncertainty and the interstate gas shortage to which it has contributed.

Under the optional procedure, producers may tender for the Commission's approval contracts for the sale of new natural gas (i.e., gas not previously dedicated to the interstate market) at rates that may exceed the maximum authorized by the applicable area rate order. The Commission may then determine in a single proceeding whether the public convenience and necessity, under § 7(c) of the Act, warrants certification of the sale and whether the rates set in the contract, including definite increments in the rates during the contract's life, are "just and reasonable" as required by § 4(a). If the certificate is issued and accepted by the producer, it is not subject to change in later proceedings under § 4, and the rates may be collected without risk of refund obligations. The Commission could, however, at some future time, use its § 5 power to change the contract rates prospectively.

No retroactive change

Moreover, when it issues the certificate, the Commission may, at the same time, authorize the producer to abandon the sale at the end of the contract term, if authorization of such future abandonment is found, under § 7(b), to be consistent with the public convenience and necessity. If

Abandonment provision not approved by CABOC

such authorization is given, the producer would be free when the contract expires to withdraw the gas from interstate commerce without having to demonstrate again that abandonment is consistent with the public convenience and necessity. Pre-granted abandonment authority thus would give a producer assurance that his present sale will not indefinitely commit the gas to what may be a lower-priced interstate market.

In return for the rate certainty (and, in some cases, abandonment assurance) made possible by Order No. 455, a producer who accepts a permanent certificate issued under the order "waive[s] all rights to seek future rate increases under Section 4 * * *, other than price escalations" called for by the contract and certificated by the Commission. In addition, the contract may not contain certain indefinite price escalation clauses, and the producer who accepts a permanent certificate waives his right to benefit from any contingent escalations of the price of flowing gas provided for under the applicable area rate order.

The Court of Appeals upheld the optional procedure in all respects save that relating to the power to grant abandonment authority simultaneously with certification. CADC held, first, that, in issuing the order, the Commission had complied with the Administrative Procedure Act's rulemaking requirements. Second it held that the optional procedure did not amount to deregulation of the field market in natural gas, since the contract rates would be judged by the "just and reasonable"

standard of § 4, the Commission's judgment would be subject to judicial review, and the Commission would remain able, under § 5, to lower the contract rates prospectively. Third, CADC ruled that advance approval of definite escalations in rates established in the contracts would not violate § 4(e) of the Act, which requires that increases in rates be preceded by 30 days notice to the Commission and the public. The Court stated that, before any fixed contract escalation went into effect, the producer would have to provide the notice that § 4(e) requires. Moreover, the Commission could use its § 5 power to disapprove the escalation. The Court agreed with challengers to the order that it might be difficult for the Commission to judge, long in advance of their effective date, that a contract's fixed escalations in rates would be just and reasonable. But, the Court stated, this problem was a matter of proof, and such a judgment might be possible in some cases even though it would not be in others. The Court concluded, therefore, that the procedure was not, as an abstract matter, necessarily inconsistent with § 4 in all conceivable applications.

Fourth, CADC held that the order's exemption of producers certificated under it from any refund obligations did not violate § 4(e), since that section provides only that the Commission may order refunds, not that it must do so in all cases. Fifth, the Court held that CADC was not impermissibly discriminating among producers in requiring that those

certificated under the optional procedure waive all rights to the contingent escalations in new gas rates provided in area rate orders. The contingent escalations, designed to stimulate the volume of interstate dedications, were integral parts of the area rate system of incentives, and had no application to producers choosing the inducements of the optional procedure. Sixth, the Court ruled that the Commission's refusal to approve indefinite rate escalations in contracts (e.g., rate increases in area rates) was not arbitrary, since the whole purpose of the new program was to provide certainty by means of exemption from the area rates, and not to give producers a chance to take advantage of increases in the area rates while immunizing them from decreases.

Finally, the court turned to that aspect of the optional procedure allowing the Commission, in granting certification, simultaneously to approve abandonment of the sale at the conclusion of the contract term. The court held such pregranted abandonment inconsistent with § 7(b) of the Act. That section provides:

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

*Sec 7(b)
- abandonment
of service*

9.

3. CONTENTIONS: The SG argues that CADC's decision on pregranted abandonment conflicts with CA10's decision in Sunray Oil Co. v. FPC, 239 F.2d 97, reversed on other grounds 353 U.S. 944 (hereinafter, Sunray I) and also this Court's decision in Sunray II, 364 U.S. 137, cited by CADC. In Sunray I, the Commission had refused to issue a § 7 certificate limited in duration, contending that § 7(b) required it to issue only unlimited certificates. CA10 disagreed, holding that the Commission did have power to limit certificates to fixed periods. Subsequently, in Sunray II, CA10 held that while the Commission has authority to issue limited term certificates, it also has authority to issue a certificate unlimited in time, even though the producer has applied for only a limited term certificate. This Court affirmed. But in so doing, it did not, as CADC erroneously thought, disapprove limited term certificates. On the contrary, the Court stated that there was "no contention that the Commission was again indulging in the erroneous notion that it had no power to issue a limited certificate." Thus the Court, in Sunray II, held only that the Commission had power to require permanent certificates, not that limited term certificates are precluded.

The SG contends that CADC's disapproval of pregranted abandonment is not required by § 7(b). Nothing in that section requires that the Commission's judgment^{as} to the effects of the abandonment cannot be made in advance of the time the abandonment is to occur. Moreover, in making its § 7(b)

judgment, the Commission can properly take into account the public need for gas prior to the proposed termination date, and whether a promise that the producer will be allowed to abandon will help in meeting that need.

No

Finally the SG argues that CADC's disapproval of pregranted abandonment will seriously impair the viability of the optional procedure and, hence, the Commission's ability to deal with the interstate gas shortage. The SG says that, since CADC is clearly wrong, this is an appropriate candidate for summary reversal.

In their responses, the challengers to the optional procedure generally rely on CADC's decision on this point. They also argue that the pregranted abandonment problem cannot be considered in isolation from other aspects of the optional procedure. Therefore, if the Court grants this petition, it should also grant the challengers' contingent cross-petition.

4. Discussion: This does not seem a proper candidate for summary reversal. It is true that, in Sunray II, this Court appears to have assumed that limited term certificates and pregranted abandonments are equivalent, and to have said, in dictum, that the Commission has power, despite § 7(b), to grant such certificates. But, despite this ^{we}assumption, there is at least a theoretical difference between pregranted abandonment, contemplated by the FPC here, and the kind of

limited term certification held within the FPC's power by CA 10 in Sunray I and apparently approved by the Court in Sunray II. Limited term certification means that the producer will be required, at the conclusion of the term, to demonstrate that the public convenience and necessity requires his continued participation in the interstate market. But it does not necessarily mean that such a producer can, at the end of the term, unilaterally cease selling interstate, without the Commission's permission under § 7(b). In other words, a producer with a limited term certificate could be required to demonstrate that the public interest either does or does not require continued interstate sales, and the Commission might be able to order him to continue selling interstate if it finds that the public convenience and necessity so requires. Pregranted abandonment, however, means that the Commission has already decided that at the end of the contract term the producers continued sales interstate will be unnecessary to the public interest.

In fact, the court in Sunray II seems to have left open the question whether pregranted abandonment would be consistent with § 7(b)'s requirement:

"Finally it is suggested that for various reasons which petitioner claims to be related to the public interest, it would be more advantageous if gas producers were given a free hand, after the completion of each contract, to determine for themselves whether they should continue to serve the interstate market. These considerations were not urged before the Commission, and hence we are

not called upon to decide whether they would compel a different approach by the Commission to the question of time limitations in certificates, or even whether, in the light of the Act's provisions - particularly the policy expressed in § 7(b) - it would be proper for it so to rely on them."

364 U.S. at 158. Moreover, the Sunray II opinion, as CADC noted, described at length the reasons why pregranted abandonment may be contrary to the public interest.

It is not clear, however, that § 7(b) compels CADC's result. The possibility of pregranted abandonment is almost certainly a significant incentive to producers to use the Commission's optional procedure and, as the SG argues, its disapproval by CADC seems likely to reduce the procedure's effectiveness. Finally, CADC dealt in this case with a rule, which stated only that the Commission would, in appropriate cases, grant abandonment simultaneously with certification. CADC's holding on this point thus meant that in no case, however short the contract term, could pregranted abandonment be consistent with the Commission's obligations under § 7(b). This holding that § 7(b) absolutely precludes pregranted abandonment, whatever the facts of a particular case, seems highly questionable.

I recommend that the petition be granted.

There is a response.

February 26, 1975

Carr

CADC opn in petn app

G

DISCUSS

Grant
RC

Grant
shy

March 14, 1975 Conference
List 3, Sheet 5

No. 74-883

Motion for Leave to File An
Amicus Brief Urging Grant

FEDERAL POWER COMM'N

v.

MOSS

The petn of the FPC is listed at page 3 of this Conference list. The Interstate Natural Gas Assoc. of America seeks leave to file an amicus brief supporting the FPC's petn for cert. INGAA's motion was filed February 20.

INGAA's members include most of the natural gas transmission companies subject to the jurisdiction of the FPC. The association is concerned that the decision below if affirmed could eliminate a significant source of natural gas for the interstate market which the pipeline companies urgently need in order to minimize curtailments in service to their customers. INGAA argues that the decision below, insofar as it declared unlawful the pre-granted abandonment provision of Commission Order No. 455

is in conflict with precedent of this Court and with decisions of CA 10, Sunray Mid-Continental Oil Co. v. FPC, 364 U.S. 137; Sun Oil Co. v. FPC, 364 U.S. 170, which held that the FPC has the power under the Natural Gas Act to grant limited-term certificates of public convenience and necessity.

DISCUSSION: Rule 42(1) provides in pertinent part:

A brief of an amicus curiae prior to consideration. . . of the petition for writ of certiorari, filed with. . . a motion for leave to file when consent is refused, may be filed only if submitted a reasonable time prior to the consideration of. . . the petition. . . Such motions are not favored.

3/4/75

Ginty

PJN

Court
 Argued, 19...
 Submitted, 19...

Voted on....., 19...
 Assigned, 19...
 Announced, 19...

No. 74-883

FEDERAL POWER COMMISSION

vs.

MOSS

RELIST

~~X-Relist~~ (74-1045)
 is on lead-list.
 It is probably untimely,
 altho Petr. have ~~to~~ may have
 been tracked by late filing of
 FPC.

DISCUSS

Relist
 for
 Rehearing
 to consider
 timeliness issue
 in 74-1045

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB-SENT	NOT VOT-ING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Rehnquist, J.			✓										
Powell, J.		✓											
Blackmun, J.		✓	✓										
Marshall, J.		✓											
White, J.		✓											
Stewart, J.													
Brennan, J.			✓										
Douglas, J.		✓											
Burger, Ch. J.		✓											

Passed (Exxon possibly involved)
 and also Grant 74-1045

Out

and on 74-1045

Court
 Argued 19...
 Submitted 19...

Voted on....., 19...
 Assigned 19...
 Announced 19...

No. 74-883

FEDERAL POWER COMM'N

vs.

MOSS

Two Hunton, Wms
 clients were parties
 before FPC. Altho
 neither wa named
 party to this appeal,
 I just do not know whether
 they continue to have an
 interest in the case.

Out at
 this time

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB-SENT	NOT VOT-ING
		G	D	N	POST	DIS	APP	REV	APP	G	D		
Rehnquist, J.			✓										
Powell, J.													
Blackmun, J.		✓											
Marshall, J.		✓	✓										
White, J.		✓											
Stewart, J.													
Brennan, J.			✓										
Douglas, J.		✓											
Burger, Ch. J.		✓											

Out

Out

Exxon

Recuse.

This is the cross-petition in the FPC optional rate procedure case. You are out because of Exxon's participation below. RC.

PRELIMINARY MEMO

May 9, 1975, Conference
List 3, Sheet 1
No. 74-1045
MOSS, ET AL.

Cert to CA DC
(Tamm, MacKinnon, Robb)

v.

FEDERAL POWER COMMISSION

Federal/Civil

Time Question*

1. SUMMARY: The FPC adopted a new certificating procedure which allowed

*/CA DC entered judgment on August 15, 1974, and denied petitions for rehearing on September 19, 1974. The Chief Justice granted the FPC an extension until January 17, 1975, and the SG filed on that date. Petrs herein, resps in No. 74-883, did not request an extension but filed this conditional cross-petition on February 20, 1975--apparently jurisdictionally out of time.

Petrs contend that the need for this petition did not arise until the SG had sought cert in No. 74-883. When that occurred, petrs argue, they recognized that the issue raised by the SG's petition could not "meaningfully be considered in isolation from the other issues decided contemporaneously by" CADC. This petition was filed 33 days after the SG's.

In at least two cases the Court has taken untimely conditional cross-petitions. Brotherhood of Railway Clerks v. Florida East Coast Railway Co., 382 U.S. 1008, 384 U.S. 239, 243; Pierson v. Ray, 384 U.S. 938, 386 U.S. 547, 551. According to Stern & Gressman the rationale is that the Court's jurisdiction over the whole case attaches when the first petition is timely filed, thus any other party may file an additional petition involving the same judgment. Stern & Gressman, at 311-12. The rationale makes some sense; however, the wording of 28 USC 2101(c) does not seem to support such an exception, and petrs present no excuse for not timely filing this conditional petition as a precaution. If the Court grant this cross-petition, it should address the issue squarely and establish guidelines for this situation.

natural gas producers to avoid some of the drawbacks of the "area rate" method. CA DC approved all but one part of the procedure and the SG sought cert in No. 74-883 requesting a summary reversal on that one issue. The challengers to the new procedure, petrs herein and resps in No. 74-883, argue in this conditional cross-petition that the entire procedure must be reviewed if the SG's petition is granted.

2. FACTS: A complete explanation of the new procedure, and the CA DC decision, is presented in the preliminary memo for No. 74-883. Basically, the new procedure allows producers to avoid certain drawbacks presented by FPC area rates--geographical price ceilings--and thereby encourages producers to dedicate newly available natural gas to the interstate market as opposed to unregulated intrastate markets. Under the new procedure producers submit individual long-term contracts to the FPC for approval; the contracts provide for the sale of "new" gas at prices which may exceed the area rate, and although the FPC could use its §5 power to change the contract rates prospectively, once a certificate is granted a producer need not fear a refund order if the area rates decrease. In return for rate certainty, including definite increments during the life of the contract, the producer waives the §4 right to seek future rate increases and to benefit from any contingent escalations of the area rate.

CA DC found this much of the procedure conformed with the Natural Gas Act, 15 USC 717; however, the court held that at the time it issues the certificate the FPC may not grant producers the right to abandon the sale at the end of the contract term. Section 7(b) of the Act, 15 USC 717f(b), requires a hearing and a finding of public convenience and necessity before the FPC allows abandonment of any service, and CA DC concluded that "pregranted abandonment requires more clairvoyance than even the Commission's expertise reasonably encompasses."

3. CONTENTIONS: In No. 74-833 the SG seeks to salvage pregranted abandonment and argues there was plain error on that issue. He suggests the Court reverse summarily

because the viability of the new procedure will be seriously impaired by the CA DC ruling.

Petrs conditionally seek to bring the rest of the judgment into question. They single out the provision under the new procedure that insures a producer that once a certificate is issued no refunds will be required if the area rate drops. Petrs claim this provision violates the statutory purpose of assuring "consumers a complete, permanent and effective bond of protection from excessive rates and charges." Atlantic Refining Co. v. Public Service Commission, 360 U.S. 378, 388 (1959).

Petrs claim the "more important question" raised here is whether the Court of Appeals can continue to allow novel procedures which give producers higher than just and reasonable prices during the pendency of review proceedings. Petrs claim that FPC and CA approval of escape hatches like this new procedure undercuts the area rate and somehow forces it continually upward.

4. DISCUSSION: Whatever loosening of the jurisdictional requirements that may be allowed for an untimely conditional cross petition should be contingent upon presentation of a strong argument for considering the untimely issues. Obviously, no such argument is presented here. Petrs fail to state why the pregranted abandonment issue is not discrete from the rest of the new certification procedure. The pregranted abandonment matter seems merely to be a question of comparing that practice with §7 and the Court's previous cases on abandonment. E. g., Sunray Oil v. FPC, 364 U.S. 137. Moreover, a complete review at this time of the new certification procedure may be premature, and may restrict the FPC's attempts to define new ways to deal with energy problems.

There is no response.

Kelly

No Op

4/29/75

mee

6
DISCLOS

GRANT
sent

Summer List 9
Sheet 3

No. 74-883

Motion to Dispense with
Printing An Appendix

FEDERAL POWER
COMMISSION

v.

MOSS

OK.
Nil

The SG moves pursuant to Rule 36(8) for leave to dispense with the requirement of a separate appendix as otherwise required by Rule 36. He states that the parties have agreed that the only items in the record that need be separately printed are those that are already reproduced in the appendix to the cert petition. He also advises that the parties may in addition refer in their briefs to any other items that are part of the original record.

DISCUSSION: This appears to be a routine motion to dispense with printing an appendix. The appendix at the back of the cert petition contains the CA opinion, judgment and order denying a rehearing, the pertinent FPC

3

orders and the statutory authority. The parties' reservation of the option to refer to "any other items that are part of the original record" does not necessarily conflict with the Rule 36(1) requirement that the appendix contain "(4) any other parts of the record to which the parties wish to direct the court's particular attention."

8/6/75

Ginty

PJN

Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

2nd DRAFT

From: Mr. Justice Brennan

SUPREME COURT OF THE UNITED STATES

Recirculated: 1/30/76

No. 74-883

Recirculated: _____

Federal Power Commission, }
Petitioner, }
v. }
John E. Moss et al. } On Writ of Certiorari to
the United States Court
of Appeals for the Dis-
trict of Columbia Circuit.

Out

[February —, 1976]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Section 7 (b) of the Natural Gas Act, 15 U. S. C. § 717f (b), provides that "[n]o natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the [Federal Power] Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission . . . that the present or future public convenience or necessity permit such abandonment."¹ The question presented in this case is whether FPC may, upon a proper finding of public convenience or necessity, simultaneously authorize both the sale of natural gas in interstate commerce by a producer and the abandonment of

¹ Section 7 (b) of the Act provides in full text:

"No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

the sale at a future date certain. The Court of Appeals for the District of Columbia Circuit construed § 7 (b) to empower FPC to authorize abandonment only when and if proposed at the end of the contract term, thus precluding power to authorize abandonment simultaneously with certifying new producer sales. Accordingly, the Court of Appeals set aside the FPC order involved in this case insofar as it permits the Commission, at the time it issues a certificate of public convenience and necessity, to authorize the producer to terminate the sale at the end of the contract term. 502 F. 2d 461 (1974). We granted certiorari. 422 U. S. 1066 (1975). We reverse.

I

FPC Order No. 455, 48 F. P. C. 218, issued August 3, 1972, is the order involved. The Order was promulgated under FPC rulemaking authority pursuant to a notice of April 6, 1972, 37 Fed. Reg. 7345, as an addition to FPC's general rules of practice and procedure, 18 CFR § 2.75 (1975). Order No. 455 established an "optional procedure for certifying new producer sales of natural gas." 48 F. P. C., at 218. The new procedure did not displace area pricing, but instead provided an alternative to "stimulate and accelerate domestic exploration and development of natural gas reserves." *Id.*, at 225. The procedure was necessary, the Commission found, because natural gas producers were frequently unable, due to hazards of area price revisions in lengthy appellate review proceedings, to rely upon rates established by FPC in its area rate orders, and thus were discouraged from exploring for new gas and committing it to the interstate market. For "there is no assurance at the present time that a producer may not ultimately have to refund some of an initial rate . . . upon which the producer relied when it dedicated a new gas supply to the interstate market."

Id., at 222-223. "[T]he producer does not know . . . how much it will get if it develops and sells new gas to the interstate market. The producer knows for sure only that once it sells in interstate commerce it cannot stop deliveries." *Id.*, at 223. "This uncertainty," the Commission found, "has impeded exploration and development." *Ibid.*

The optional procedure introduced by Order No. 455 was designed to "lessen rate uncertainty which has prevailed since the early 1960's." *Id.*, at 219. The procedure has several features. First, it permits producers to tender for FPC approval contracts for the sale of new natural gas² at rates that may exceed the maximum authorized by the applicable rate order.³ Second, FPC will determine in a single proceeding whether the "public convenience and necessity" under § 7 (c) of the Act, 15 U. S. C. § 717f (c), warrants the issuance of a certificate authorizing the sale and whether the rates called for by the contract are "just and reasonable" under § 4 (a), 15 U. S. C. § 717c (a). Third, a permanent certificate issued by the Commission and accepted by the producer is not subject to change in later proceedings under § 4 of the Act,⁴ 15 U. S. C. § 717c, and the rates may be col-

²The optional procedure is available for sales of gas produced from wells commenced after April 6, 1972, and gas that has not previously been sold in interstate commerce. 18 CFR § 2.75 (b) (5) (1975).

³After adoption of the optional procedure, FPC established a national ceiling rate for some sales of natural gas. Order No. 899, — F. P. C. — (1974). The optional procedure was then amended to permit producers to tender contracts for certification including rates exceeding the national ceiling, as well as area rates. Order No. 455-B, — F. P. C. — (1974).

⁴The procedure does not, however, limit the applicability of § 5, 15 U. S. C. § 717d. See 18 CFR § 2.75 (d) (1975). The Commission noted in Order No. 455 that it was unable to "bind a future Commission not to invoke the prospective operation of Section 5"; the

lected without risk of refund obligations. *Id.*, at 228. See 18 CFR § 2.75 (d) (1975). Fourth, Order No. 455 authorizes inclusion in the permanent certificate of the abandonment assurance—or “pregranted abandonment”—called in question in this case. 18 CFR § 2.75 (e) (1975).⁵ The authority to include assurance that the producer may abandon the sale at the end of the contract term is, however, to be exercised only upon appropriate findings by FPC of public convenience or necessity, as required by § 7 (b). Order No. 455-A, 48 F. P. C. 477, 481 (1972).

The importance to the producer of the pregranted abandonment provision is obvious. Pregranted abandonment gives the producer assurance that his present sale will not indefinitely commit the gas to what may be a lower-priced interstate market: he will be free on the contract expiration date to discontinue deliveries to the purchaser without having to demonstrate again that abandonment is consistent with the public convenience or necessity.

II

The entire optional procedure of Order No. 455 was attacked in petitions for review before the Court of Appeals, which upheld the Order in all respects save the pregranted abandonment authority.⁶ In holding that

Commissioners further stated that “[t]o the extent that this Commission can grant certainty of rates, we do so.” 48 F. P. C., at 223.

⁵This provision reads as follows:

“Applications presented hereunder will be considered for permanent certification, either with or without pregranted abandonment, notwithstanding that the contract rate may be in excess of an area ceiling rate established in a prior opinion or order of this Commission.”

⁶Respondents’ cross-petition seeking review of the Court of Appeals’ decision to the extent that it adversely resolved their contentions was denied. 422 U. S. 1020 (1975).

§ 7 (b) requires a public convenience or necessity finding by FPC at the time of the proposed abandonment, thus precluding such finding at the time of certification, the Court of Appeals stated, 502 F. 2d, at 472:

"Pregranted abandonment would leave a producer free to discontinue service to the interstate market, perhaps years after the original certification, with no contemporaneous obligation on the producer to justify withdrawal of service as consistent with the public convenience and necessity. We think Section 7 (b) does not contemplate or authorize such procedure.

"... It appears to us ... that pregranted abandonment requires more clairvoyance than even the Commission's expertise reasonably encompasses."

We find nothing on the face of § 7 (b) to support the holding that the section "does not contemplate or authorize such procedure." There is no express provision prescribing the timing of the finding of public convenience or necessity that is prerequisite to FPC authority to allow the producer to abandon a sale. In the absence of an explicit direction, the inference may reasonably be made that Congress left the timing of the finding within the general discretionary power granted FPC "to regulate abandonment of service," S. Rep. No. 1162, 75th Cong., 1st Sess., 2 (1937); H. R. Rep. No. 709, 75th Cong., 1st Sess., 2 (1937). "[T]he Commission's broad responsibilities . . . demand a generous construction of its statutory authority," *Permian Basin Area Rate Cases*, 390 U. S. 747, 776 (1968), and that inference is plainly consistent with Congress' regulatory goals.

The reasoning of the Court of Appeals that pregranted abandonment requires "clairvoyance" overlooks the express power granted to FPC in § 7 (b) to allow abandon-

ment upon a proper finding that the "present or future" public convenience or necessity warrants permission to abandon. The power to authorize an abandonment upon finding that it is justified by future public convenience or necessity clearly encompasses advance authorization warranted by consideration of future circumstances and the necessary estimation of tomorrow's needs. That has been our conclusion when FPC authority to make forecasts of future events has been challenged in other contexts. For example, in rejecting the contention that the FPC could not consider forecasts of the future under the nearly identical standard of § 7 (e), *FPC v. Transcontinental Gas Corp.*, 365 U. S. 1, 28-29 (1961), stated that "a forecast of the direction in which the future public interest lies necessarily involves deductions based on the expert knowledge of the agency." Similarly, as to another agency, we have stated our unwillingness to let "uncertainties as to the future . . . paralyze the [Interstate Commerce] Commission into inaction." *United States v. Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 241 (1945). Thus, to the extent that exercising the pregranted abandonment authority entails forecasting future developments affecting supply and demand, we cannot say that requiring this degree of "clairvoyance" renders the provision beyond FPC authority.

Furthermore, FPC may determine that present supply and demand conditions require that pregranted abandonment be authorized in appropriate cases to encourage exploration for new gas and its dedication to the interstate market, since the unwillingness of producers to make indefinite commitments has made potentially available supplies inaccessible to the interstate market. We conclude therefore that an optional procedure encompassing pregranted authority intended to draw new gas supplies to the interstate market is clearly within FPC

authority to permit abandonments justified by either *present* or *future* public convenience or necessity.⁷

Order No. 455 does not authorize specific abandonments. It merely establishes an optional procedure under which pregranted abandonment may be authorized in appropriate cases. Any pregranted abandonments approved under this procedure are subject to judicial review under the Act. See § 19 (b), 15 U. S. C. § 717r (b). We should not presume, as the Court of Appeals did, that the Commission is not competent to make proper findings supported by substantial evidence and consistent with § 7 (b) in approving pregranted abandonment. Rather, the question whether particular pregranted abandonment authorizations are beyond the Commission's expertise should await resolution in concrete cases. See *FPC v. Texaco, Inc.*, 417 U. S. 380, 392 (1974).⁸ It suffices for the purposes of this case that

⁷ FPC has disclaimed any reliance on the ground, permitted under § 7 (b), that "the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted." We therefore have no occasion to address the question whether pregranted abandonment on that ground would exceed FPC authority.

⁸ Paradoxically, similar considerations led the Court of Appeals to reject respondents' challenge to a provision of the optional procedure requiring the Commission to determine the reasonableness of future rate escalations included in contracts submitted pursuant to the procedure. Yet no attempt was made to distinguish the case of future rate escalations from that of pregranted abandonment in this respect. The Court said:

"We cannot say as an abstract proposition of law that it is impossible for the Commission to make an advance determination of 'reasonableness' in proceedings under Section 4. Although as a practical matter one may be skeptical about the ability of the Commission to succeed in this endeavor, we think it may make the attempt. Whether it succeeds will depend upon the evidentiary basis for the escalations proposed in a given contract and the reasonableness of Commission findings and projections supporting and approving such escalations. The question is one of proof which can

we read § 7 (b) as leaving the timing of approval of abandonments to FPC discretion.⁹

III

The Court of Appeals stated that its construction of § 7 (b) as denying FPC authority to authorize abandonment on a future date certain at the time of certification was "fortified" by *Sunray Mid-Continent Oil Co. v. FPC* (*Sunray II*), 364 U. S. 137 (1960). *Sunray II* held that FPC had authority to tender a certificate of public convenience and necessity without time limitation to a producer who applied for a certificate authorizing sales for 20 years only. The Court reasoned, *id.*, at 142:

"If petitioners' contentions as to the want of authority in the Commission to grant a permanent certificate where one of limited duration has been sought for, were to be sustained, the way would be clear for every independent producer of natural gas to seek certification only for the limited period of its initial contract with the transmission company, and thus automatically be free at a future date, untrammelled by Commission regulation, to reassess whether it desired to continue serving the interstate market."

We understand the Court of Appeals to read this passage as implying that a limited-term certificate would be barred by the Act, and that a permanent certificate with pregranted abandonment would also be barred since

be answered only on a record setting out a particular proposal and the evidence supporting it." 502 F. 2d, at 488.

⁹ Respondents claim that the pregranted abandonment provision amounts to deregulation akin to that condemned in *FPC v. Texaco, Inc.*, *supra*, at 400. But, unlike the small-producer exemption involved there, the FPC in the optional procedure retains full control over its regulatory jurisdiction.

such a certificate, as FPC concedes, FPC Brief, at 22, is legally and functionally indistinguishable from a limited-term certificate.¹⁰ But the Court of Appeals' reading of *Sunray II* was patently erroneous. *Sunray II* in fact indicated that FPC is authorized to issue limited-term certificates. The Court of Appeals for the Tenth Circuit had addressed that question at an earlier stage of the litigation and had held that FPC was authorized to issue such certificates. *Sunray Mid-Continent Oil Co. v. FPC*, 239 F. 2d 97 (1956), rev'd on other grounds, 353 U. S. 944 (1957) (*Sunray I*).¹¹ *Sunray II* implicitly approved this holding in stating, 364 U. S., at 157: "There is no contention that the Commission was again indulging in the erroneous notion that it had no power to issue a limited certificate."

Thus, rather than imply that the Act forbids the issuance of a limited-term certificate, *Sunray II* approved the holding of the Court of Appeals for the Tenth Circuit that the Act permits the issuance of such a certificate.¹² *Sunray II* therefore supports the conclusion we

¹⁰ The Court of Appeals found that pregranted abandonment has "the same potentiality of prejudice to consumers" that this Court was concerned about in *Sunray II*, 502 F. 2d, at 472. In that case, however, Sunray's position would have removed FPC discretion not to issue limited-term certificates wherever a producer sought a limited certificate. Both *Sunray II* and today's decision maintain FPC discretion in this regard, while the Court of Appeals' conclusion reduces FPC's ability to exercise its regulatory responsibility.

¹¹ The first decision of the Court of Appeals for the Tenth Circuit was reversed in *Sunray I* on the ground that the Court had itself decided whether FPC should have issued a limited-term certificate, rather than remanding to the Commission to resolve this question in the first instance, 353 U. S. 944. *Sunray II* sustained the Court of Appeals' later affirmation of FPC's issuance of an unlimited certificate, 267 F. 2d 471 (1959).

¹² Moreover, if issuance of limited-term certificates were barred

have reached and does not fortify the Court of Appeals' construction of § 7 (b). In both the case of the limited-term certificate and the case of the permanent certificate with pregranted abandonment, FPC determines at the time of certification that the present or future public convenience or necessity justifies the issuance of a certificate that allows discontinuance of service at a future date certain without need for further proceedings.

The judgment of the Court of Appeals is reversed insofar as it set aside the pregranted abandonment provision of Order No. 455, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

by the Act, there would have been no need to decide *Sway II*. In that circumstance the producer could hardly have complained that FPC failed to recognize its request for only a limited certificate, since such a reading of the Act requires FPC in all cases to issue unlimited-term certificates.

